

Winter 2011

## Defective Products in a Defective System: Legislation Designed to Level the Playing Field in International Trade

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### Recommended Citation

Shelton, Jessica (2011) "Defective Products in a Defective System: Legislation Designed to Level the Playing Field in International Trade," *Roger Williams University Law Review*: Vol. 16: Iss. 1, Article 10.  
Available at: [http://docs.rwu.edu/rwu\\_LR/vol16/iss1/10](http://docs.rwu.edu/rwu_LR/vol16/iss1/10)

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# Defective Products in a Defective System: Legislation Designed to Level the Playing Field in International Trade

By Jessica Shelton\*

## I. INTRODUCTION

The global marketplace is a prominent and still-rising force in international trade, contributing to the ever-increasing globalization of trade while fueling the availability of affordable products to satisfy the demands of consumers worldwide. For the United States, this translates into massive volumes of imported foreign products flowing in the American stream of commerce.<sup>1</sup> All too often, these more affordable foreign-manufactured products prove defective, inevitably resulting in a variety of physical injuries and financial losses for many unlucky American consumers. When this happens, those injured naturally demand legal redress, usually in U.S. courts, and this means they must navigate the exceedingly complicated field of transnational

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\* Juris Doctor, Roger Williams University, School of Law, 2011; B.A. Stonehill College, 2008. The author would like to express her appreciation to her friends and editors, Rebecca Aitchison, Dan Hirseman, Marissa Janton, and Rachael Schupp-Star. Special thanks to Professor Louise Ellen Teitz for her keen insight and guidance.

1. *Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable Hearing Before the Subcomm. On Admin. Oversight and the Courts of the S. Comm. On the Judiciary*, 111th Cong. (2009) (statement of Thomas L. Gowen, Partner, Locks Law Firm) [hereinafter Gowen, *Leveling the Playing Field*] (noting that the U.S. imported 2.6 trillion worth of goods in 2006, and the volume of imports has grown over 300% over the last decade, and is expected to triple again by 2015).

litigation and substantive law even to begin the process of suing those responsible.

Indeed, the current system of holding foreign manufacturers of defective products accountable is itself defective: when faulty products enter the U.S. from abroad and subsequently injure American consumers, lengthy and unfair battles over procedure characterize any litigation that ensues. Plaintiffs often see their cases travel up to the Supreme Court of the United States solely on preliminary matters such as personal jurisdiction, and the front-loaded costs of litigating these initial legal matters frequently deplete plaintiff's resources, thus depriving them of the ability to pursue the merits of the case.<sup>2</sup> In short, the U.S. legal system has not paralleled the advances in international trade and commerce, and thus it inescapably fails to account for the difficulty of successfully suing foreign manufacturers of these defective goods. "American jurisdictional law is simply not fit for export," but is rather the result of decades of complicated and confused case law and efforts to formulate standards and rules.<sup>3</sup> Suing foreign defendants presents a variety of hurdles, and successful litigation and meaningful compensation entails a "chase" that is inescapably "tricky" and frustrating.<sup>4</sup>

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2. See, e.g., *D'Jamoos v. Pilatus Aircraft Ctr., Inc.*, No. 09-489, 2009 WL 3444799, at \*1-24 (U.S. Oct. 22, 2009) (petitioning the U.S. Supreme Court for writ of certiorari solely on the issue of whether purposeful availment of the market of the U.S. as a whole, which creates general jurisdiction over federal claims, also creates specific jurisdiction in a state in which harm occurs as a result of purposeful availment of the national market).

3. Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 *BROOK. J. INT'L L.* 111, 117 (1998).

In consequence of well over a century of experimentation and vacillation, we are stuck with a confused, unwieldy and, at times, unfair Supreme Court case law. In contrast to not only civil law nations but also other common law countries, to this day we lack a rational catalog of jurisdictional bases. Instead of reasonably clear and cogent provisions, as they are found throughout the civilized world, we rely on a jumble of state long-arm statutes and Supreme Court case law that is chaotic and incoherent. Not only practitioners and lower state and federal judges, but even law professors and, at times, Supreme Court Justices, find it difficult to make sense out of the hodgepodge of majority, concurring and dissenting opinions and the Court's opaque terminology.

*Id.*

4. See Porter, Rebecca, *Attorneys Seek MDL to Scale Chinese Drywall Problem*, 45 *TRIAL* 64, 66 (2009) [hereinafter Porter, *Chinese Drywall MDL*].

This is hardly a novel concern. In truth, it has plagued American consumers for years. Recent contamination scares and other unsafe products have led to increased media coverage and attention, but these problems are by no means new ones.<sup>5</sup> Currently, there are several legislative efforts to correct the problem, or at the very least ameliorate any number of the procedural hurdles that U.S. plaintiffs face when seeking legal redress against foreign defendants. Testimony in support of one such bill included the assertion that “[i]t is unfair to handicap injured American citizens and provide foreign tortfeasors with a technical defense simply because our court system is not organized on the same basis as our markets,” and thus legislation to correct this imbalance and thereby “level the playing field” is not only necessary, but overdue.<sup>6</sup>

This Comment discusses the major arguments for and against the passage of legislation that would require foreign manufacturers to consent to jurisdiction and service of process before participating in trade with the U.S. Section II provides relevant background information, including pertinent examples of defective products that accounted for the increased media attention this situation has received, as well as brief accounts of each procedural hurdle faced by U.S. plaintiffs, including personal jurisdiction, service of process, and enforcement of judgments. Section II also gives a detailed account of the disadvantages to U.S. consumers, manufacturers, and distributors that come about as a result of the U.S. legal system. Section III explores legislative efforts to remedy trade and procedural inequities, using S. 1606, the Foreign Manufacturers Legal Accountability Act of

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5. Gowen, *Leveling the Playing Field*, *supra* note 1 (asserting that “foreign manufacturers enthusiastically seek access to the American market but assiduously seek to avoid responsibility and accountability in American courts for injuries caused by their products”). *See also infra* pp. 4-5 for examples of harmful defective products and contamination scares in the U.S.

6. *See* Gowen, *Leveling the Playing Field*, *supra* note 1. At the hearing, Senator Whitehouse maintained that his legislation would require that a manufacturer who imports goods into the U.S. must designate an agent for service of process who will accept the legal papers required to initiate a lawsuit, and it would likewise require the development of a register of these agents so that an injured American can inform the manufacturer defendant of a lawsuit quickly and cheaply. This proposal is discussed in much greater detail below. *See infra* Section III.

2009, as the primary vehicle to discuss the most appropriate means to achieve this end.<sup>7</sup> Section IV then examines the intricacies and problematic issues imposed by legislative procedural mechanisms, questioning whether a bill such as S. 1606 would be constitutional, how, if at all, it resolves the difficulty of enforcement of judgments, whether it might provoke retaliation by partners in trade, and, perhaps most significantly, whether it constitutes a violation of U.S. trade treaty obligations.

Finally, Section V concludes that legislation designed to remedy the defective system of suing foreign manufacturers should be implemented as it would reduce litigation time and expense considerably, easing the burden faced by American consumers seeking redress. Furthermore, such legislation would serve a fundamental domestic interest by protecting the health and safety of American consumers: by alerting foreign manufacturers that they would no longer be able to circumvent the U.S. legal system, thereby escaping liability, the U.S. government would likewise incentivize the same foreign manufacturers to manufacture safer products in compliance with U.S. health and safety regulations.

## II. BACKGROUND

### *A. A History of Injurious Defective Products*

A significant factor in the issue at hand is the simple fact that the United States manufactures only a fraction of the products sold within the country.<sup>8</sup> The increasingly global marketplace and outsourced manufacturing provides the U.S. with cheaper products, but these items are often manufactured in countries with minimal regulatory oversight.<sup>9</sup> Indeed, a “skyrocketing number” of imported goods being sold in the American marketplace hail from foreign countries and an alarming percentage of these imports result in harm to American

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7. See Foreign Manufacturers Legal Accountability Act, S. 1606, 111th Cong. (2009).

8. See U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE: U.S. INT’L TRADE IN GOODS AND SERVS. (Sept. 2009), available at [http://www.census.gov/foreign-trade/Press-Release/current\\_press\\_release/ft900.pdf](http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf).

9. See Kathleen Flynn Peterson, *A Clear and Present Danger*, 44 TRIAL 9, 9 (2008).

consumers.<sup>10</sup> Toys are among the most commonly defective items in the American marketplace; they are often covered in lead paint, contain deadly magnets, or are coated with substances akin to date rape drugs.<sup>11</sup> Naturally, this prevalence of unsafe toys in the American market has given rise to panic among parents, suppliers, and U.S. federal agencies charged with ensuring the safety of products distributed in the country.

Problems with defective products are not limited to the hazards of toys alone. Recent contaminations of many other foreign-made products have wreaked havoc in the American market as well.<sup>12</sup> Faulty and substandard toothpastes, pet foods, pharmaceuticals, and malfunctioning high-risk medical devices are examples of the hazards faced by the American consumer of foreign products.<sup>13</sup> The most recent and sensationalized example of defective products causing harm to American consumers is the

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10. Hal Stratton, Chairman, U.S. Consumer Prod. Safety Comm., Testimony Submitted to the H. Appropriations Subcomm. on Transp., Treasury, and HUD, the Judiciary, DC 1 (Apr. 14, 2005) (according to the U.S. Consumer Product Safety Commission, deaths, injuries, and property damage from consumer product incidents cost the U.S. more than \$700 billion annually); *see also* Peterson, *supra* note 9 at 9 (noting that all twenty-four types of toys recalled for safety reasons from January to June 2007 were manufactured overseas); *see generally* Chris Reidy, *Reebok Recalls Bracelets After Boy Dies*, BOSTON GLOBE, Mar. 24, 2006, at C1 (in February of 2006, a four-year-old boy in Minnesota died of lead poisoning after swallowing part of a bracelet made by "a third-party, independent vendor in China" that was 99% lead).

11. *See* Peterson, *supra* note 9 at 9; Julia A. Phillips, Comment, *Does "Made in China Translate to "Watch Out" For Consumers? The U.S. Congressional Response to Consumer Product Safety Concerns*, 27 PENN ST. INT'L L. REV. 217, 217-19 (2008) (discussing dangerous product recalls such as the 7.3 million Mattel, Inc. Polly Pocket dolls and accessories recalled because they contained small magnets that could dislodge and be swallowed or aspirated, causing injuries such as intestinal perforations, requiring hospitalization for any number of days).

12. *See* Mark P. Chalos, *Successfully Suing Foreign Manufacturers*, 44 TRIAL 32, 32 (2008); *see generally* LUCY P. ALLEN ET AL., NAT'L ECON. RESEARCH ASSOC., CHINA PRODUCT RECALLS: WHAT'S AT STAKE AND WHAT'S NEXT, 14-15 (2008), available at [http://www.nera.com/extImage/PUB\\_China\\_Recalls\\_Trends\\_0609.pdf](http://www.nera.com/extImage/PUB_China_Recalls_Trends_0609.pdf).

13. *See* Chalos, *supra* note 12, at 32; Rebecca Porter, *FDA Faulted for Oversight of Foreign Medical Device and Drug Makers*, 44 AUG. TRIAL 16, 17 (2008) [hereinafter Porter, *FDA Oversight*]; Elizabeth Weise & Julie Schmit, *Pet Food Recall Spreads, and So Does Confusion*, USA TODAY, Apr. 2, 2007, at 5D, available at [http://www.usatoday.com/news/nation/2007-04-01-pet-food-recall\\_N.htm](http://www.usatoday.com/news/nation/2007-04-01-pet-food-recall_N.htm).

influx of faulty Chinese drywall, which was used abundantly at the height of the U.S. housing boom, when building materials were in short supply.<sup>14</sup> Since then, “the walls literally began to come down,” and complaints of nosebleeds, headaches, itchy eyes and skin, difficulty breathing, sinus infections, and asthma attacks abound.<sup>15</sup> As a result, the Consumer Product Safety Commission has received more than 180 reports of health problems or metal corrosion problems related to Chinese drywall.<sup>16</sup> After the onset of this unsettling epidemic, at least fifteen class actions were filed in Florida, with others in Alabama, California, and Louisiana, and individual suits have been brought as well.<sup>17</sup>

Clearly, the U.S. faces a multitude of issues in the realm of defective foreign products, and odds are greater than ever that products sold in the U.S. – from cars, aircrafts, and component parts to household products, jewelry, and toys – were actually designed and manufactured on foreign soil.<sup>18</sup>

#### *B. Procedural Hurdles U.S. Plaintiffs Struggle to Overcome*

This wave of defective foreign products that has struck the U.S. in recent years has proven that action must be taken to

14. See THE ASSOCIATED PRESS, *Chinese Drywall Poses Potential Risks*, available at <http://www.msnbc.msn.com/id/30169267/> (noting that American construction companies used millions of pounds of Chinese-made drywall because it was abundant and cheap); see also Christopher J. Belter & Joseph M. Hanna, *What Lies Beneath: The Gathering Storm of Chinese Drywall Defect Claims*, FOR THE DEF. June, 2009, at 36-40 (discussing the growing drywall problem, the resulting litigation, and the legislative acknowledgment of the issues).

15. See Porter, *Chinese Drywall MDL*, *supra* note 4, at 64; see also Ashby Jones, *Does the New Product-Liability Boom Lie...Inside the Walls?*, WALL ST. J. L. BLOG (Apr. 17, 2009, 6:24 PM), <http://blogs.wsj.com/law/2009/04/17/does-the-new-product-liability-boom-lie-inside-the-walls/>.

16. Porter, *Chinese Drywall MDL*, *supra* note 4, at 64.

17. See *id.* Currently, there are a number of actions pending; the U.S. Judicial Panel on Multidistrict Litigation transferred all the federal drywall cases to the U.S. District Court for the Eastern District of Louisiana and consolidated them for pretrial proceedings. See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (J.P.M.L. June 15, 2009)). See also *Allen v. Knauf Plasterboard Tianjin Co.*, No. 2:09 CV00054 (M.D. Fla.) (filed Jan. 30, 2009).

18. See U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, *supra* note 8.

protect U.S. consumers.<sup>19</sup> The current globalized economy, with its “fast travel and communications,” paves the way for numerous disputes between parties from different countries; these disputes have increased steadily in recent years, and will certainly continue to do so.<sup>20</sup> In most circumstances, harmed consumers face daunting challenges in seeking legal redress against foreign manufacturers because of the difficulty of suing in foreign countries and the unwillingness of foreign courts to enforce U.S. court judgments.<sup>21</sup> More specifically, the procedural barriers faced by U.S. plaintiffs when seeking to hold foreign manufacturers accountable include: difficulty obtaining valid personal jurisdiction, the complexities of serving process or notice to the defendant, and the often near-impossibility of enforcing U.S. judgments abroad.<sup>22</sup> These hurdles, combined with the many different approaches used in legal systems abroad, invariably

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19. Note that a number of legislative measures have been pursued against specific products and their recalls, such as those tort bills aimed at particular instances of defective products. *See, e.g.,* Drywall Safety Act of 2009, H.R. 1977, 111th Cong. (2009) (proposing action to prevent further use of defective drywall, having been sparked by the recent outbreak of contaminated drywall).

20. INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 1 (David J. Levy ed., ABA Tort Trial and Ins. Practice Section 2003) [hereinafter INTERNATIONAL LITIGATION] (describing the frequency and regularity of litigation in the courts of the U.S. against people and entities from other countries).

21. *See* Adam Feeney, Comment, *In Search of a Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products?*, 34 J. CORP. L. 567, 576 (2009) (asserting that ascertaining the location or address of foreign manufacturers is often a problem, and even after determining the location, company records are often incomplete and the manufacturer’s level of cooperation in complying with the lawsuit is low).

22. *See generally* 4 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §§ 1067.1, 1069 (3d ed. 2010). A party suing in a U.S. court must first be able to find a court that has Constitutional power authority over the defendant, or “personal jurisdiction”; after filing, the party must then inform the defendant of the lawsuit and its contents, meaning summons and complaint must be properly served; at the end of the lawsuit, the party must be able to collect any money awarded, especially when the defendant’s assets are outside of the U.S. *See* Jennifer Haltom Doan & Darby V. Doan, *Satisfying Due Process in Obtaining Jurisdiction over the Foreign Component Part Manufacturer*, 76 DEF. COUNS. J. 145, 146 (2009). *See also* *Hanson v. Denckla*, 357 U.S. 235, 263-64 (1958)(Douglas, J., dissenting); Chalos, *supra* note 12, at 33.



cause U.S. consumers to face extraordinary difficulties and complications when suing in U.S. courts and enforcing U.S. judgments abroad—more difficulty than many foreign consumers face in the reverse situation.<sup>23</sup>

### 1. *Personal Jurisdiction*

A court's determination of whether it can assert personal jurisdiction over an out-of-state defendant, including a non-U.S. defendant, is a complex, case-specific analysis with a long and confused history.<sup>24</sup> In short, personal jurisdiction represents the ability of a court to hear a dispute and to render a valid judgment that will be recognized by other courts.<sup>25</sup> Thus, proper exercise of personal jurisdiction is vital to both litigation and enforcement of judgments, domestically and abroad.<sup>26</sup>

American courts have struggled to define the limits of personal jurisdiction over foreign defendants. In fact, "[u]ntil the mid-20th century, the widely held view was that a court's jurisdiction extended no further than to the boundaries of the state's territory."<sup>27</sup> As international commerce expanded and industry increased world-wide, U.S. courts attempted to develop a more expansive concept of personal jurisdiction, which ultimately yielded only "vague concepts labeled with precise-sounding names."<sup>28</sup> As a result, an analysis of whether jurisdiction will be

23. *Leveling the Playing Field and Protecting Americans: Hearing Before the Subcomm. On Admin. Oversight and the Courts of the S. Comm. On the Judiciary*, 111th Cong. (2009) (statement of Professor Louise Ellen Teitz, Professor of Law, Roger Williams University School of Law) [hereinafter Teitz, *Leveling the Playing Field*].

24. See generally 18 Fletcher, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 8640.10 (2009). See also Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1620 (2001); INTERNATIONAL LITIGATION, *supra* note 20, at 1, 2.

25. See *Burnham v. Superior Court of California*, 495 U.S. 604, 609-10 (1990) (determining additionally that a court that exercises personal jurisdiction over a defendant in the absence of a proper jurisdictional basis has violated that defendant's constitutional due process right, and therefore any subsequent judgment is invalid).

26. See Teitz, *Leveling the Playing Field*, *supra* note 23 ("When the defendant is an alien, there is the additional concern with potential enforcement in foreign locations where the defendant has assets.").

27. Chalos, *supra* note 12, at 33; see *Pennoyer v. Neff*, 95 U.S. 714 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

28. See *Intl. Shoe Co. v. Wash.*, 326 U.S. 310 (1945) (setting forth the

proper, regardless of whether the defendant is a foreign individual or entity, begins with two components: fairness and minimum contacts.<sup>29</sup>

Personal jurisdiction in the U.S. is governed by both the Due Process Clause, generally under the Fourteenth Amendment in state and federal court (when based on diversity jurisdiction), and the laws of the forum state.<sup>30</sup> Beginning in 1945 with *International Shoe Co. v. Washington*, the Supreme Court determined that the Due Process Clause deems personal jurisdiction proper when a nonresident defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>31</sup> Since this decision, subsequent cases have demonstrated that contacts must include purposeful availment of the privileges of the forum, and such purposeful availment arises when the contacts result from the actions of the defendant, creating a substantial connection with the forum, or where the defendant’s efforts are “purposefully directed” at that forum.<sup>32</sup>

In *Asahi Metal Industry Co. v. Superior Court*, the Court was unable to agree what set of circumstances should reasonably put a defendant on notice that it would be subject to a forum state’s

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“minimum contacts” test); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (holding that, to warrant an exercise of personal jurisdiction, the Constitution requires “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State”); Chalos, *supra* note 12, at 33.

29. See INTERNATIONAL LITIGATION, *supra* note 20, at 114, 122-23.

30. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-91 (1980) (determining that Oklahoma’s assertion of personal jurisdiction over a New York car dealership under its “long-arm” statute was impermissible on due process grounds).

31. See 326 U.S. at 316. See also *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (citing *Int’l Shoe Co.*, 326 U.S. at 316) (holding that a court may, under the Fourteenth Amendment, exercise personal jurisdiction over a foreign defendant only when the defendant’s contacts with the forum state are sufficient for the defendant to reasonably predict that it would be subject to the forum state’s jurisdiction); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); INTERNATIONAL LITIGATION, *supra* note 20, at 1, 2.

32. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985); *Hanson*, 357 U.S. at 253 (1958). See also *Int’l Shoe Co.*, 326 U.S. at 319 (determining that personal jurisdiction will depend on the quality and nature of the activity in relation to the fair administration of the law).

jurisdiction.<sup>33</sup> Although the Court broke the requirements down into two distinct parts—the defendant’s purposeful minimum contacts with the forum and the fairness to the defendant in having to be subject to jurisdiction in the forum—the Court did not produce a majority opinion on the issue of whether a “stream-of-commerce theory” (the theory that a defendant should reasonably expect that placing a product into the stream of commerce could cause it to end up in the forum state) was, on its own, sufficient to support personal jurisdiction.<sup>34</sup> Today, there remains a great deal of ambiguity with regard to the proper exercise of personal jurisdiction, and the Court has not further clarified this issue. With state and federal courts of appeals applying varying standards in their determination of what contacts with the forum state are sufficient to support a court’s assertion of personal jurisdiction over an out-of-state defendant, it is incredibly challenging to accurately predict whether a court will assert personal jurisdiction over a defendant.

When Justice O’Connor wrote for the *Asahi* majority that, “[c]onsidering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over *Asahi* in this instance would be unreasonable and unfair,” the practical effect of this language was essentially to encourage foreign manufacturers to challenge the assertion of personal jurisdiction as a default response to suits against them.<sup>35</sup>

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33. See 480 U.S. 102, 122 (1987). *Asahi*, a component part valve manufacturer, sold valves to Cheng Shin Rubber Industrial Co. in Taiwan. *Id.* at 106. Cheng Shin then used the valves in tires that it exported to the U.S. The Court held that *Asahi* did not have sufficient contacts with California (where a defective tire caused injury) for the district court to assert personal jurisdiction over it. *Id.* at 106, 108.

34. See *Asahi*, 480 U.S. at 108-21. Justice O’Connor’s majority opinion required that there must be some action “purposefully directed” towards the forum state to support personal jurisdiction, even if *Asahi* had reason to believe that its product would end up in California. *Id.* at 112. Meanwhile, Justice Brennan’s concurrence maintained that the fact that the injury-causing product had a foreseeable path from the manufacturer to the retailer on its own was sufficient to support personal jurisdiction. *Id.* at 117 (Brennan, J., concurring). Thus, the stream-of-commerce debate remains unresolved, and several circuits still allow district courts to assert jurisdiction based upon stream-of-commerce theories alone.

35. *Id.* at 116; Teitz, *Leveling the Playing Field*, *supra* note 23. See also INTERNATIONAL LITIGATION, *supra* note 20, at 1, 122 (noting that “[s]pecial

It is an inescapable truth that foreign defendants habitually claim that they have not acted purposefully toward the forum state even though they have derived significant profits from sales in that state and others, and “the availability of this defense amply demonstrates that our system of justice has not changed to match the vast changes in our system of commerce.”<sup>36</sup> Ultimately, as an

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burdens are imposed on foreign defendants defending law suits in the United States and therefore the courts must assess the fairness of asserting jurisdiction over foreign defendants”; and also asserting that “the fact that a defendant corporation is headquartered in a foreign country will militate against a finding that jurisdiction is fair”).

36. Gowen, *Leveling the Playing Field*, *supra* note 1.

The Supreme Court of New Jersey is presently considering a case in which a British manufacturer of large scrap shears for use in the scrap industry is claiming that it intended only to sell its products in the United States—not in New Jersey. Every time we allow this argument we allow these manufacturers to foist a fiction upon our courts. A company cannot design, manufacture or sell a product into the American market without selling it into one of the fifty states or the District of Columbia. In the New Jersey case the foreign manufacturer attended industry trade shows in Las Vegas and had an exclusive national distributor located in Ohio but is resisting jurisdiction of the New Jersey courts where its product caused serious injury based on the fiction that it was selling only to the American market not to the market in one of the states. Justice Brennan more accurately understood the nature of commerce in foreign products in this country when he said that the stream of commerce refers not to unpredictable eddies but to the regular and anticipated flow of product from manufacturer to consumer in any of the fifty states when it is sold into the American market.

See *id.* Gowen is referencing *J. McIntyre Machinery v. Nicastro*; at the time this Comment went to press, the Supreme Court of the United States has granted certiorari to consider the issues presented in that dispute. See *J. McIntyre Machinery v. Nicastro*, 131 S.Ct. 62 (2010). The procedural posture of that case is as follows: the trial court dismissed the case for lack of personal jurisdiction after determining that there was no basis for the foreign company to expect that its products would be sold in New Jersey. *Nicastro v. McIntyre Machinery*, 399 N.J. Super 539, 45 A2d 92 (App. Div. 2008). On appeal, New Jersey’s intermediate appellate court reversed, holding that jurisdiction was proper because J. McIntyre does business in the U.S. through a single distributor, meaning that the foreign company could have expected the products to end up anywhere in the U.S., including New Jersey. *Id.* The New Jersey Supreme Court ultimately affirmed that decision, reasoning that even if it lacked specific contacts with New Jersey, J. McIntyre had “targeted” the entire U.S. *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48 (2010). J. McIntyre filed a petition for certiorari, which the Court granted on Sept. 28, 2010. *Nicastro*, 131 S.Ct. at 62. Notably, this is the Court’s first reconsideration of these issues since it skirted them in *Asahi*, thus this case

unfortunate consequence of this confusion, the now-routine challenge of jurisdiction by foreign parties, and the fact-specific nature of contacts, purposeful availment, and fairness to the foreign defendant, cases involving foreign manufacturers generate exceptionally expensive and time-consuming litigation over the complexity and varying degrees of these aforementioned issues.<sup>37</sup>

## 2. Service of Process

Another aspect of constitutionally mandated due process requires a method of meaningful notice "reasonably calculated under the circumstances" to provide notice of the litigation and an opportunity to be heard.<sup>38</sup> In other words, the defendant must be given proper notice and an opportunity to appear in the lawsuit, and therefore the means and procedure for effecting service of

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could be a vehicle for significant change.

37. Importantly, Justice O'Connor noted that the Court in *Asahi* had "no occasion to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts rather than on the contacts between the defendant and the State in which the federal court sits." See 480 U.S. at 113 n.\* Likewise, this Comment does not address national aggregation of contacts, as per Federal Rule 4(k)(2), which would only apply to federal court matters. "Rule 4(k)(2), applicable only to federal question cases, provides a federal long-arm statute as a fallback for instances in which a [foreign] defendant is not subject to any state's long-arm but the exercise of jurisdiction would be consistent with the Constitution." Louise Ellen Teitz, *TRANSNATIONAL LITIGATION* 39 (1996 & Supp. 1999) [hereinafter *TRANSNATIONAL LITIGATION*]. This bill would impact courts on both the federal and state level because the approach is not through federal court rules, but rather through legislation.

38. See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (reasoning that "adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice [ ] implicit in due process are satisfied"). See also Teitz, *Leveling the Playing Field*, *supra* note 23. While compliance with the U.S. rules for service is necessary to obtain valid jurisdiction in the U.S., foreign law must also be observed, "especially if there is the potential because the defendant has insufficient assets in the US of seeking subsequent enforcement of any judgment outside of the U.S., either in the country in which service is made, or another country"; as such, validity of service involves "both looking backward to obtaining valid jurisdiction and forward to achieving enforcement of any subsequent judgment." In addition, service in the foreign country must conform with that foreign law as some countries sanction violations of their sovereignty by criminal or civil penalties. *Id.*

process on a foreign defendant will vary depending on the forum and on the defendant's home country.<sup>39</sup> "A failure of notice means a failure of due process," which may subject the suit to dismissal, or may even prevent any award or judgment from being enforced abroad.<sup>40</sup> Thus, much like personal jurisdiction, this procedural issue can prove to be a cumbersome, costly, and time-consuming process that delays legal redress for the aggrieved consumer.<sup>41</sup> Service of process is the traditional method of assuring notice to defendants, but when foreign defendants are involved, technical requirements can prove fatal to successful service.<sup>42</sup>

Specific treaties, statutes and rules govern the methods for serving process in foreign countries. If the defendant's home country is one with which the U.S. has an applicable treaty, that treaty controls, both in federal and state court, and it may or may not be the exclusive vehicle for service.<sup>43</sup> The Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Hague Convention") is the exclusive means of serving a defendant in a member country, as will soon be discussed in greater detail.<sup>44</sup> If

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39. See FED. R. CIV. P. 4(f) advisory committee's note ("[g]iven the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts," service of process in foreign countries needed to be facilitated); Chalos, *supra* note 12, at 32.

40. Ronan E. Degan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 834 (1988).

41. For example, Thomas L. Gowen testified at the hearing supporting the proposition of legislation to correct these procedural hurdles that it took "approximately three months to obtain service on a large corporation in Buenos Aires, Argentina, after the complaint was directed to the central authority there for service after compliance with all of the requirements of the Hague Convention." See Gowen, *Leveling the Playing Field*, *supra* note 1.

42. See Degan, *supra*, note 40, at 834.

43. See TRANSNATIONAL LITIGATION, *supra* note 37, at 133.

44. See 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter "Hague Convention"] (ratified by the U.S. in 1969); Fed. R. Civ. P. 4(h), 4(h)(2), and 4(f); INTERNATIONAL LITIGATION, *supra* note 20, at 9-10 (noting that service abroad under the Hague Service Convention supersedes the requirements of Rule 4 and applicable state rules). The Hague Service Convention can be found at 20 U.S.T. 361, reprinted immediately after Fed. R. Civ. P. 4, 28 U.S.C.A. Rule 4 (West Supp. 2002). "In contrast, the Inter-American Convention on Letters Rogatory, to which Mexico subscribes, does not preempt other means of service." TRANSNATIONAL LITIGATION, *supra* note 37, at 133. Significantly, what is "crucial for triggering The Hague Service

no treaty controls, there are several options both under Rule 4 of the Federal Rules of Civil Procedure and also under state procedures, but there are a number of limitations on service imposed by the foreign country where service is sought.<sup>45</sup>

Many of the U.S.'s top trading partners are parties to the Hague Convention, and thus the implications of service under this treaty are weighty.<sup>46</sup> Federal Rule of Civil Procedure 4(f)(1) gives deference to the form of service prescribed by treaties, so when a matter falls within the scope of the Hague Convention, service must be made "strictly according to its guidelines," for where Rule 4(f) conflicts with the Hague Convention, the Convention must prevail.<sup>47</sup>

The Hague Convention was drafted to accomplish three primary objectives: "to simplify the methods of serving in the territory of one state documents issued by the courts of another," "to establish a system for service that best would ensure that the person served received actual notice in time to respond to pending litigation," and to create a means by which proof of service abroad easily could be made.<sup>48</sup> To meet these aims, the drafters

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Convention, in federal or state court, is that service is effected abroad ("where there is occasion to transmit a judicial or extrajudicial document for service abroad)." Teitz, *Leveling the Playing Field*, *supra* note 23; *see generally* TRANSNATIONAL LITIGATION, *supra* note 37, at 131-55.

45. *See* Fed. R. Civ. P. 4(f). In federal cases, Rule 4 governs service of process, and under this rule, service on foreign defendants is permitted pursuant to the Hague Service Convention or any other applicable treaty. If there is no governing treaty, service may be made: according to the law of the foreign country in which service of process is being attempted; as directed by a foreign authority in response to a letter rogatory, which is a written request issued by a court filing an action that asks the appropriate foreign authority for assistance in serving documents on one of its citizens, or a letter of request; by signed-receipt mail delivery sent by the clerk of the court; pursuant to any court-ordered means not prohibited by international agreement. *See also* Marcantonio v. Primorsk Shipping Corp., 206 F. Supp. 2d 54, 58 (D. Mass. 2002) (determining that the "country in which service is being made is the country whose laws must be obeyed, not the country of origin of the person or corporation being served"). *See also* TRANSNATIONAL LITIGATION, *supra* note 37, at 131-55.

46. Hague Conference on Private International Law, table, *available at* [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=41](http://www.hcch.net/index_en.php?act=conventions.status&cid=41); U.S. CENSUS BUREAU, *supra* note 8.

47. Chilean Nitrate Corp. v. M.V. Hans Leonhardt, 810 F. Supp. 732, 734 (E.D. La. 1992); INTERNATIONAL LITIGATION, *supra* note 20, at 5.

48. Degnan, *supra* note 40, at 837.

developed a basic system for service while also allowing for the use of several alternative methods, "as long as the state in which service is made does not object to the particular method utilized."<sup>49</sup>

The Convention sets up a governmental "Central Authority" in each signatory state that is responsible for executing requests from abroad for service of judicial documents; some countries do not object to the use of direct mail and other means of service, such as under Rule 4.<sup>50</sup> However, there are alternative methods for effecting service under the treaty—unless the receiving state has objected to the alternative methods—and among those specifically mentioned alternatives are the freedom to send judicial documents by postal channels directly to the person to be served and the freedom of any person interested in the litigation to effect service through the judicial officers, officials, or competent persons of the receiving state.<sup>51</sup> While these alternatives are often feasible, a number of signatory states have objected to one or more of them, so that "an American lawyer attempting to serve process under the Convention must read carefully the objections filed by the receiving state."<sup>52</sup>

49. *Id.*

50. See Fed. R. Civ. P. 4; INTERNATIONAL LITIGATION, *supra* note 20, at 12; Degnan, *supra* note 40, at 837. "In the United States, the Central Authority is the Department of Justice. The Department does not facilitate service of American process abroad; American litigants must deliver their documents directly to the foreign Central Authority." *Id.* at 837 n.183.

The person serving process in the sending state must send to the Central Authority of the receiving state two copies of a 'request,' which conform to the model annexed to the Convention, as well as the original and a copy of the documents to be served. If the request does not comply with the requirements, the Central Authority will inform the sender of its objections and will not complete service until the defects are remedied. If the request is in compliance, the Authority will arrange to have service accomplished by a method consistent with that country's internal law, or by a method requested, if that method comports with the internal law. Once service is effected, the Authority returns a certificate to the sender stating that service has been accomplished, the method used to do so, the date it was completed, and the person to whom process was delivered.

*Id.* at 837-38.

51. See Hague Convention art. 10, *supra* note 44; Degnan, *supra* note 40, at 838.

52. See Degnan, *supra* note 40, at 838 (citing *Lemme v. Wine of Japan*



Thus the use of this Authority adds not only costs, as most lawyers use a private company to prepare the documents, but also delay because these documents must be delivered to the foreign Central Authority to be served domestically, after which the Authority returns proof of service.<sup>53</sup> Aside from this frustrating delay of service due to the mandated use of a Central Authority, the Hague Convention also generally requires that documents be translated into the relevant foreign language, which poses another added expense and considerable delay.<sup>54</sup> To complicate matters further, the Hague Convention does not include a time requirement in which the foreign authorities must attempt service, resulting in additional confusion, delay, and expense.<sup>55</sup> For these reasons, service is an area of significant expense and delay for harmed American consumers seeking to hold foreign manufacturers accountable.

The importance of the Hague Convention with regard to service of process culminates in a strict bottom line: failure to comply with the Convention voids the attempted service.<sup>56</sup> When service is invalid, the summons will be quashed or, more

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Import, Inc., 631 F. Supp. 456, 464 (E.D.N.Y. 1986) (Japan objects to personal service, but not delivery through mail); *Harris v. Browning-Ferris Indus. Chem. Servs., Inc.*, 100 F.R.D. 775, 777 (M.D. La. 1984) (Germany objects to mail service); *Kadota v. Hosogai*, 125 Ariz. 131, 135-36 (Ct. App. 1980) (Japan objects to personal service)).

53. See Teitz, *Leveling the Playing Field*, *supra* note 23. Additionally, Teitz's testimony included a note regarding the recent Hague Conference Special Commission on the Service Convention: there, "many countries were trying to complete service within three months, but many others, including China, indicated that adopting guidelines requiring service within three months was not feasible."

54. See Chalos, *supra* note 12, at 34 (explaining that "Article 5 of the Hague Service Convention requires that, unless specifically waived by the receiving country, documents must be translated into the receiving country's language" and "[t]ranslating complex legal documents can cost several thousand dollars and take weeks to complete"); see also INTERNATIONAL LITIGATION, *supra* note 20, at 18.

55. See Chalos, *supra* note 12, at 34 (noting also that Article 15 of the Convention "presents significant hurdles to obtaining a default judgment if service through the authorities stalls").

56. See INTERNATIONAL LITIGATION, *supra* note 20, at 5 n.14 (noting that where a country is a party to the Convention, "the Convention's procedures are the *exclusive means* by which service of process may be effected in that country." (emphasis added)). Note that defendants may waive service, in which case the issue becomes significant at the close of the suit with regard to enforcement.

dramatically, the suit will be dismissed, leaving the injured plaintiff to either attempt service once more, or accept defeat by procedural minutiae.<sup>57</sup>

### 3. Enforcement

The final area in which U.S. parties suing foreign manufacturers face seemingly insurmountable hurdles is enforcement of U.S. judgments abroad, for the foreign defendant often will have no assets in this country against which to enforce a judgment. Although the U.S. is not a party to any bilateral or multilateral agreements for the enforcement of civil judgments—meaning that a foreign country is under no legal obligation to recognize a U.S. civil judgment—the U.S. generally recognizes and enforces foreign judgments domestically.<sup>58</sup> Foreign countries are reluctant to enforce U.S. judgments for many reasons, such as hostility towards the jury system and towards compensatory awards that include significant amounts for pain and suffering or punitive damages; at any rate, when a U.S. judgment is in fact recognized by a foreign court, even then the process may prove lengthy and costly, requiring relitigation of many issues.<sup>59</sup>

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57. See TRANSNATIONAL LITIGATION, *supra* note 37, at 135. Note, however, that often compliance with the Convention's process is not required if the state and federal courts interpret the service as completed within the U.S. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Supreme Court of the United States upheld service that did not comply with the Convention since service was effected in the U.S., rather than abroad. See 486 U.S. 694, 700 (1988); TRANSNATIONAL LITIGATION, *supra* note 37, at 137.

58. See Teitz, *Leveling the Playing Field*, *supra* note 23. ("The reality is that we have a trade imbalance, in that we import and enforce most incoming foreign judgments far more often than we are able to export and enforce our judgments overseas. "American plaintiffs who can find a foreign defendant's assets in this country can of course enforce a judgment from one state in a sister state under the Full Faith and Credit Clause and use expedited procedures under uniform state law.") See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

59. See Teitz, *Leveling the Playing Field*, *supra* note 23 (noting additionally that when service was not made in accordance with an applicable treaty or when the U.S. basis for personal jurisdiction is not recognized by the foreign country, the resulting judgment will not be recognized); see also Donald C. Clarke, *The Enforcement of United States Court Judgments in China: A Research Note* (George Wash. Univ. Law Sch. Pub. Law and Legal Theory Working Paper, Legal Studies Research Paper No. 236, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_](http://papers.ssrn.com/sol3/papers.cfm?abstract_)

### C. Disadvantaged U.S. Consumers and Manufacturers

These procedural barriers result in disadvantage to U.S. consumers and U.S. manufacturers and distributors alike. The system creates a clear competitive advantage for foreign manufacturers as U.S. manufacturers can be sued far more easily under the current system, and any judgments rendered against these domestic manufacturers will certainly be enforced nationwide under the Full Faith and Credit Clause.<sup>60</sup> Moreover, this means that some foreign-based companies circumvent the costs of compliance with the U.S. system of regulating products, and thus foreign manufacturers are able to reduce their prices accordingly.<sup>61</sup> “This places those companies who are subject to the full effects of the U.S. legal system at a competitive disadvantage because their competitors are avoiding this ‘tort tax.’”<sup>62</sup>

Furthermore, these procedural hurdles often lead injured consumers to seek redress elsewhere. Indeed, when a plaintiff cannot obtain proper personal jurisdiction over a foreign manufacturer, the plaintiff will likely sue the easier target: the U.S. retailer, who will in turn struggle to recover from its own insurer, as well as the foreign manufacturer of the defective and injurious product. Because of the extensive delays that compliance with the Hague Service Convention often necessitates, namely those based on the requirement of translating documents into a relevant language and service through a Central Authority, a U.S. plaintiff considering suing a foreign as opposed to a domestic defendant will undoubtedly “save time and money by suing the U.S. defendant.”<sup>63</sup> In addition, a U.S. plaintiff

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id =943922. For example, researchers have not found any instance where a Chinese court has enforced a U.S. judgment without first relitigating the issues of the case. *Id.* In fact, in almost no modern cases have Chinese courts enforced the judgments of foreign courts without relitigating the case on the merits. *Id.* at 3-4. Furthermore, Chinese courts have, in several cases, refused to enforce the judgments of foreign courts. *Id.* at 4.

60. See U.S. CONST. art. IV, § 1.

61. See *Leveling the Playing Field and Protecting Americans: Hearing Before the Sen. Judiciary Comm. Subcomm. On Admin. Oversight and the Courts*, 111th Cong. (2009) (statement of Victor E. Schwartz, Esq., Partner, Shook, Hardy & Bacon, LLP, on behalf of the U.S. Chamber Institute for Legal Reform and the U.S. Chamber of Commerce).

62. *Id.*

63. Teitz, *Leveling the Playing Field*, *supra* note 23.

considering potential defendants would be “well-advised to sue any domestic defendant with potential substantive liability or to make sure the potential foreign defendant has assets in the U.S. or at least debtors to it in the U.S.”<sup>64</sup> As a result of these delays and expenses associated with serving foreign manufacturers with a lawsuit and establishing jurisdiction over these foreign defendants, manufacturers are inevitably at a competitive disadvantage as foreign companies are able to offer less expensive products that do not comply with U.S. safety requirements.

These examples demonstrate several reasons why U.S. plaintiffs would forgo the difficulties of pursuing redress from foreign manufacturers in favor of simply turning on the U.S. supplier, distributor, or any other U.S. company within the chain of supply. In fact, lawyers sometimes even encourage injured plaintiffs to take aim at the easiest targets rather than facing the prohibitively expensive and time and resource-consuming measures.<sup>65</sup> For instance, plaintiffs may be advised that although the foreign manufacturer bears “the ultimate moral responsibility for problems with their products, under most states’ laws, domestic actors have legal obligations not to market and sell dangerous or defective products, regardless of their manufacturing origin” thus, with the procedural challenges that arise in litigation against foreign defendants, “successfully getting redress for a person injured by a foreign product often begins at home.”<sup>66</sup>

This guidance is not misplaced: it is undoubtedly true that it would be far simpler to obtain personal jurisdiction, complete service of process, and enforce any subsequent judgments when the defendant is a U.S. company. However, the cost of this strategy can be substantial. With the implementation of these tactics, foreign manufacturers will often escape liability unscathed, leaving U.S. companies to bear the brunt, if not the entirety, of their liability.

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64. *Id.*

65. See Chalos, *supra* note 12, at 37 (“Counsel should keep in mind that when a product that has been manufactured abroad causes injury in the United States, domestic parties may be culpable, too.”).

66. *Id.*

## III. LEGISLATIVE EFFORTS

Leaving U.S. consumers with little recourse other than to pursue redress from domestic companies, and protecting foreign manufacturers with the aforementioned procedural barriers, the current system is certainly flawed. The problem is not a new one; past efforts to legislate around these barriers have fallen short, but proponents of these attempted measures continue to pursue legislative means to a fair and accountable end.<sup>67</sup>

*A. The Foreign Manufacturers Accountability Bill: The Proposal and The Facts*

The Foreign Manufacturers Legal Accountability Bill S. 1606 was introduced into the United States Senate on August 6, 2009.<sup>68</sup> This bipartisan legislation is aimed at reducing the legal hurdles facing Americans injured by products manufactured outside the U.S., as discussed above.<sup>69</sup> Senators Sheldon Whitehouse (D-R.I.), Jeff Sessions (R-Ala.) and Richard Durbin (D-Ill.) introduced the Foreign Manufacturers Legal Accountability Act of 2009 ("the Act") to bring foreign manufacturers within the jurisdiction of U.S. courts.<sup>70</sup> The Act would cover Consumer Product Safety

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67. In response to the reality that foreign manufacturers who "enthusiastically seek to enter the U.S. market do not have the same accountability as domestic manufacturers," Linda Sanchez (D-Cal.) introduced the Protecting Americans from Unsafe Foreign Products Act (H.R. 5913) in the House on May 1, 2008. If passed, the law would have allowed service of process on foreign manufacturers where they reside, are found, have an agent, or transact business. See Porter, *FDA Oversight*, *supra* note 13, at 60. The bill would have allowed "American consumers harmed by foreign defective products to obtain personal jurisdiction by serving foreign manufacturers with process where they reside, are found, have an agent or transact business" and "would also help eliminate the unfair competitive advantage enjoyed by foreign manufacturers and ensure that they can be held accountable in U.S. courts for injuries consumers suffer as a result of defective products." *Protecting Americans from Unsafe Products Act: Hearing on H.R. 5913 Before the H. Subcomm. on the Judiciary*, 110th Cong. 6 (2008) (statement of Linda T. Sanchez, Chairwoman of the H. Judiciary Subcomm. on Commercial and Administrative Law), available at <http://judiciary.house.gov/hearings/printers/110th/42119.pdf>.

68. See S. 1606 111th Cong. (2009); *A Weekly Review of U.S. Trade Policy Developments*, THE WASHINGTON MONITOR (Winston & Strawn L.L.P., Washington, D.C.), Vol. 13 Issue 33, Aug. 18, 2009, at 2.

69. S. 1606; see also discussion *supra*, pp. 7-15.

70. S. 1606.

Commission-regulated products such as children's toys, Food and Drug Administration-regulated products such as prescription drugs and medical devices, and Environmental Protection Agency-regulated products, including pesticides.<sup>71</sup>

In support of the bill, Senator Whitehouse commented on the shocking number of recent examples of U.S. consumers injured by foreign products, noting that "American [businesses and consumers] harmed by defective foreign products need justice, and they do not get it when foreign manufacturers use technical legal defenses to avoid [compensating those] they have injured."<sup>72</sup> The Act would lower the two procedural hurdles to bringing suit against foreign manufacturers in the U.S., firstly by simplifying service of process, requiring every manufacturer to have an "agent" located in at least one state where the manufacturer does business that would accept service of process for all civil and regulatory claims, and secondly by subjecting the manufacturer to the jurisdiction of state and federal courts in the U.S., where it might previously have been beyond such jurisdiction.<sup>73</sup> As written, S. 1606 requires manufacturers seeking to export to the U.S. to designate a registered agent in the U.S. that is authorized to accept service of process on behalf of the manufacturer. It also requires foreign manufacturers that seek to import products covered by consumer protection and safety regulations to acknowledge their consent to jurisdiction in the state in which the registered agent is located.<sup>74</sup> Clearly, this bill is meant to reduce

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71. *Id.* at §4.

72. *Leveling the Playing Field and Protecting Americans: Hearing Before the Sen. Judiciary Comm. Subcomm. On Admin. Oversight and the Courts*, 111th Cong. (2009) (statement of Sen. Sheldon Whitehouse, United States Senator for the State of Rhode Island) [hereinafter Whitehouse, *Leveling the Playing Field*]. Testimony at the hearing given to recount a number of instances in the past few years where foreign-made products injured Americans included discussion of the lead-tainted children's charm bracelet that claimed a four year-old's life in 2006, the contaminated blood thinner that contributed to many deaths in 2008, and the defective drywall imported from China.

73. *See* S. 1606. The goal is to replace the "cumbersome" procedural systems with a requirement that, within six months of the date of the Bill's enactment, the head each relevant government agency shall "require foreign manufacturers ... to establish a registered agent." *See id.*; Whitehouse, *Leveling the Playing Field*, *supra* note 72.

74. *See* S. 1606. Also, as it stands, the bill would apply to manufacturers of whole or component parts of specific products if those manufacturers

the harm caused by defective products manufactured by foreign entities and to protect the health and safety of American consumers in the face of a wave of defective foreign products; its aim is to ensure that all foreign products have an accountable manufacturer present in a U.S. jurisdiction to facilitate any suits that may be brought against those manufacturers if U.S. health and safety requirements are not met.

### *B. The Purported Role of the Act*

The bill will reduce the amount of litigation involved in suits against foreign manufacturers and therefore ease the burden on judicial resources, the legal system, and ameliorate costs faced by U.S. plaintiffs.<sup>75</sup> Although the Act is not without its critics, it is currently enjoying strong bipartisan support as a carefully drafted effort to correct the flaws in the system. The Act and its requirement of consent to jurisdiction and designation of an agent for service for foreign manufacturers could “reduce the uncertainty that plaintiffs face about if and where they can sue and maintain jurisdiction within the U.S.”<sup>76</sup> Furthermore, S.

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produce in excess of a minimum value or quantity of those products. The specified products are drugs, devices, cosmetics, biological products, consumer products, chemical substances and pesticides (as defined under U.S. law), and the threshold level or quantity is to be established by the relevant government agency regulating that product. *See id.*; *see also* Whitehouse, *Leveling the Playing Field*, *supra* note 72. Note that S. 1606’s companion House bill, H.R. 4678 will seek to achieve similar ends. *See* H.R. 4678 111th Cong. (2010). Specifically, the bill would “require foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers, and for other purposes.” *Id.*

75. Consent is a traditional basis for personal jurisdiction; S. 1606 mandates consent by foreign manufacturers, thereby eliminating lengthy litigation over the nature and extent of minimum contacts necessary for the court to have authority over the defendant, as discussed above, in at least one state. This, of course, is analogous to the procedure domestic manufacturers are subjected to, as domestic manufacturers can always be sued either at the principal place of business or in the state of incorporation.

76. *See* S. 1606; Teitz, *Leveling the Playing Field*, *supra* note 23. “Although not on all fours, a recent case which involved a Swiss-made single engine plane that was en route from Florida to Rhode Island and crashed in Pennsylvania in connection with a planned stop there demonstrates the difficulties that US plaintiffs may have in suing foreign manufacturers without extended litigation in what would seem to be a reasonable forum, the site of the crash, for a manufacturer where the majority of that model of the

1606 would significantly change the law in jurisdictions that have traditionally required purposeful availment, subjecting a foreign manufacturer to suit in at least the state where it has established its registered agent.<sup>77</sup> In short, foreign manufacturers whose products are imported into the U.S. would no longer be able to avoid litigation in the U.S. by restricting their business and operations to foreign locations, or structuring their business through layers of independent agents and distributors.

### *C. Current Status and Implications for the Future*

In light of the circumstances discussed above as well as the legal struggle in which many U.S. consumers have found themselves currently embroiled, both of which have given rise to the proposal of legislation such as S. 1606, it is plain that some action must be taken to provide procedural recourse that comports with the evolving and expanding global marketplace.<sup>78</sup> At present, the bill is being considered by the Finance Committee, has reasonably strong bipartisan support as a popular remedy within the Senate and the House, and is also supported by the Consumers Union and the Consumer Federation of America.<sup>79</sup> For now, S. 1606 is far from becoming law as it has many legislative stages and phases to pass before reaching that status.<sup>80</sup>

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plane 'ultimately are sold in the United States.'" *Id.*

77. See S. 1606 §5.

78. See generally discussion *supra* pp. 4-5, 7-15 (noting the harm suffered by American consumers and the procedural barriers that stand in the way of their seeking of legal redress).

79. See THE WASHINGTON MONITOR, *supra* note 68 at 2. S. 1606 has been read twice in the Senate and referred to the Finance Committee. It may then return to the Senate floor for a vote. If the Bill passes the Senate it will need to be passed in the House, which will involve referral to a House Committee, and if passed in both House and Senate, it will need to be signed by the President, who could choose to veto it. See *id.*

80. The bill is only the first step in the legislative process. Introduced bills and resolutions first go to committees that deliberate, investigate, and revise them before they go to general debate. The majority of bills and resolutions never make it out of committee. Indeed, S. 1606 must pass before the 111<sup>th</sup> Congressional Session comes to a close, otherwise it will need to be reintroduced for further consideration. See GovTrack.us, S. 1606: Foreign Manufacturers Legal Accountability Act of 2009, "Overview," 111<sup>th</sup> Cong. (2009) (database of federal legislation), <http://www.govtrack.us/congress/bill?bill=s111-1606> (last visited Oct. 6, 2010). "Information on committee proceedings is notoriously opaque": the committees vary in the



If passed, however, the bill will revolutionize the system and make it easier, faster, and less expensive to sue foreign manufacturers, some currently beyond the reach of U.S. courts.

#### IV. COMPLICATIONS AND PROBLEMATIC ISSUES WITH LEGISLATION AIMING TO SURMOUNT PROCEDURAL HURDLES

Ostensibly, S. 1606 seems poised for success: it would seemingly remedy the inability to hold foreign manufacturers accountable for their defective products, thereby “leveling the playing field” for U.S. consumers and manufacturers alike. Even so, it is important to consider several issues raised by this proposed legislation. Because no such legislation has been passed at this time, it follows that it is indeed a genuine challenge to draft a bill that is at once sufficiently remedial but does not infringe on other substantive areas of law or inappropriately and discriminatorily expand jurisdiction. S. 1606 and any similar legislation must therefore be analyzed to determine whether it survives a constitutional challenge, whether it might inspire retaliation by U.S. trade partners, whether it is consistent with U.S. treaty obligations, and whether it ameliorates the many difficulties of enforcing judgments.

##### *A. The Constitutional Challenge*

Among the challenges that confront legislation such as S. 1606 are those of the constitutional variety. Past bills have overreached the constitutional parameters of personal jurisdiction, and thus the primary matter at issue in this constitutional challenge is the requirement of valid personal jurisdiction.<sup>81</sup> S. 1606 would authorize jurisdiction over foreign defendants by virtue of designation of an agent for service—which acknowledges

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amount of information made public during the process, and they often do not provide basic public information such as the results of votes electronically or in an understandable format. See GovTrack.us, H.R. 5913: Protecting Americans from Unsafe Foreign Products Act, “Committee Assignments,” 110th Cong. (2008) (database of federal legislation), <http://www.govtrack.us/congress/bill.xpd?bill=h110-5913&tab=committees> (last visited Oct. 6, 2010).

81. Note, however, that past attempts at legislation were far more tort-oriented, whereas this bill is entirely procedural. Thus, it is all the more imperative that this legislation comports with the Constitution so as to ensure the validity of U.S. courts exercising personal jurisdiction over these foreign defendants.

consent to the jurisdiction of the State in which the agent is located—and conscious importing of products into the U.S.<sup>82</sup> That authorization arguably reaches beyond the bounds of the constitutional principle that state courts can only establish personal jurisdiction over defendants who purposefully establish minimum contacts with that forum state.<sup>83</sup>

As an important threshold matter, it is necessary to note that the protections of the U.S. Constitution extend to all defendants, even foreign defendants. This principle, though never clearly articulated by the Supreme Court, has been implicit for many years. Foreign defendants do not have fewer rights to challenge constitutionality of jurisdiction, for “[c]ountless cases assume that foreign companies have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction.”<sup>84</sup> Moreover, that assumption by so many courts “probably is too solidly entrenched to be questioned at this late date.”<sup>85</sup> As such, the applicability of the requirements of personal jurisdiction and adequate notice to alien defendants “cannot be doubted since the courts long have recognized that our due process guarantees are available to ‘persons’ whether or not they are citizens of the United States.”<sup>86</sup>

With this principle in mind, legislation that seeks to make foreign defendants more susceptible to suit in the U.S. must not infringe upon the rights of these defendants. Legislation must be carefully drafted to stay within the bounds of the Constitution. The bill’s requirement that a foreign manufacturer designate an agent for service of process arguably contravenes these rights, but it is at best an unconvincing argument. All that is required for valid service of process is meaningful notice under federal or state law: under S. 1606, meaningful notice would be served upon the foreign manufacturer’s chosen agent in whichever state that agent

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82. See S. 1606.

83. See *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (determining that it is long-standing judicial precedent that state courts may only assert personal jurisdiction over defendants who establish minimum contacts with that forum state).

84. See *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985).

85. *Id.*

86. *Degnan*, *supra* note 40, at 800 (citing *Galvan v. Press*, 347 U.S. 522, 530 (1954)).

resides. An example of such proper service in action is *Volkswagenwerk Aktiengesellschaft v. Schlunk*, where the Supreme Court upheld service that did not comply with the Hague Convention since service was effected in the U.S., rather than abroad.<sup>87</sup> Thus, the foreign manufacturer enjoys the same due process requirements as domestic manufacturers, and no constitutional right is violated.

The minimum contacts requirement might also be seen as problematic because this legislation purports to eliminate that aspect of litigation by designation of agents, which effectuates consent to jurisdiction. Generally, minimum contacts or other traditional forms of jurisdiction, such as domicile or consent, are sufficient for the exercise of personal jurisdiction over a defendant to be valid.<sup>88</sup> With regard to minimum contacts, however, *Shaffer v. Heitner* held that the analysis set forth in *International Shoe* is, unequivocally, the only analysis to conduct in assessing minimum contacts, and this must comport with the Fourteenth Amendment to constitute a valid exercise of personal jurisdiction.<sup>89</sup>

S. 1606 renders minimum contacts irrelevant. The bill would make clear to foreign manufacturers that by importing their products into the U.S. and by registering an agent in the U.S., as would be required by this legislation, they are effectively consenting to the jurisdiction of the courts in the one U.S. state where their designated agent is located. Consenting to personal jurisdiction in this manner is entirely permissible; the purpose of personal jurisdiction is to protect a defendant's liberty interest, and so it can be waived, which would be the practical effect of consent in the situation S. 1606 envisions.<sup>90</sup> Therefore, by

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87. See 486 U.S. 694, 700 (1988). There, Volkswagenwerk, a German manufacturer, was served in a products liability case through Volkswagen of America, its domestic subsidiary, under the state Illinois state law that allows service on foreign corporations through service on agents, voluntary or involuntary, located within the state. See also TRANSNATIONAL LITIGATION, *supra* note 37, at 137.

88. See TRANSNATIONAL LITIGATION, *supra* note 37, at 46-47, 53. "Consent and waiver have long been recognized as forming the basis for personal jurisdiction." See also Robert C. Casad, 1 JURISDICTION IN CIVIL ACTIONS 130-35 (2d ed. 1998).

89. 433 U.S. 186, 212 (1977) (determining that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.").

90. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,

consenting to jurisdiction, the expensive litigation concerning service and personal jurisdiction would be averted, leaving only the merits of the suit to be settled.

Though the argument might be made that this disregard of a minimum contacts assessment should render any exercise of personal jurisdiction over foreign defendants invalid, in fact, the bill is consistent with constitutional requirements. The only way to challenge the bill's proposed arrangement is to argue that foreign manufacturers are not meaningfully consenting to jurisdiction. However, it must be noted that these foreign manufacturers do not enjoy an automatic right to the U.S. marketplace, and thus the U.S. government is of course permitted to set certain regulations and conditions. Here, the bill's mandates are both reasonable and fair: it is not discriminating against foreign manufacturers, nor is it purporting to serve as a blanket restriction on all products shipped to the U.S. Instead, the bill regulates only those products that would be regulated by the Consumer Product Safety Commission, the Environmental Protection Agency, and the Food and Drug Administration, emphasizing the focus on incentivizing foreign manufacturers to make products that comply with the same health and safety regulations to which U.S. manufacturers must conform.<sup>91</sup> For this reason, a constitutional challenge to the effectiveness of designating an agent for service of process in the U.S.—and thereby acknowledging consent to the jurisdiction of the State in which the registered agent is located—proves weak and unfounded.

### *B. Retaliatory Measures*

Conceivably, legislation such as S. 1606 could prompt U.S. trade partners to respond with similar legislation in their own countries. Indeed, as Professor Louise Ellen Teitz cautioned at the May 2009 hearing, there is the “strong possibility” that U.S.

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456 U.S. 694, 703 (noting that because the personal jurisdiction requirement can be waived, there are a “variety of legal arrangements” by which a litigant may give “express or implied consent to the personal jurisdiction of the court”).

91. See S. 1606. The issue of perceived discrimination against foreign manufacturers is revisited and discussed in much greater detail *infra*, pp. 29-32.

trading partners will adopt legislation that “may make it harder for U.S. manufacturers exporting their products overseas.”<sup>92</sup> Many observers express similar sentiments. Writers and commentators share the concern that retaliation could be the immediate, and even vengeful, reaction. “Does anyone honestly think that our foreign trade partners are going to line up and sign up for this one without any tit-for-tat that would require more stringent product liability regulation and enforcement on American exports?”<sup>93</sup> Likewise, one writer warns that foreign companies selling in China enjoy a “very nice products liability climate” where the distributor is primarily liable, and “although foreign companies do get sued here once in a while, by and large they have little to fear.” If the U.S. were to change its laws to make it easier to sue Chinese exporters to the U.S., is it not likely that “the Chinese government might think about tightening things up?”<sup>94</sup> The sarcastic response to this rhetorical question: “[n]ah, Beijing never cares about reciprocity . . .”<sup>95</sup>

Surely this aspect of any legislation purporting to tailor the system to more easily sue foreigners will not be overlooked. However, as a practical matter, it seems unlikely that the passage of legislation such as S. 1606 would inspire retaliation. The bill merely changes the procedures for suing foreign defendants, making no change to underlying substantive law. Moreover, realistically, the U.S. exports far less to other countries than it imports, meaning that other countries receive comparatively little from the U.S.<sup>96</sup> Finally, and perhaps most importantly, the simple reality is that parties would prefer to sue in the U.S., not in foreign countries. A foreign country changing its laws or procedures will not have significant bearing on U.S. practices. In the unlikely event a foreign country did in fact modify its laws in a retaliatory fashion, Constitutional due process would very likely

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92. Teitz, *Leveling the Playing Field*, *supra* note 23.

93. See AbiK, *Foreign Manufacturers Legal Accountability Act: Yeah, right*, LAWYERS AND SETTLEMENTS, <http://www.lawyersandsettlements.com/blog/?s=foreign+manufacturers+legal+accountability> (Aug. 13, 2009).

94. See Stan Abrams, *U.S. Senate Goes After Foreign (esp. Chinese) Manufacturers*, CHINA HEARSAY, <http://www.chinahearsay.com/us-senate-goes-after-foreign-esp-chinese-manufacturers/> (Aug. 12, 2009).

95. *Id.*

96. See generally U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, *supra* note 8.

be violated and so the U.S. would refuse to enforce the judgment of that foreign court.

*C. Treaty Obligations under the General Agreement on Tariffs and Trade*

Another area of difficulty for legislation such as S. 1606 is in the realm of international treaties and agreements. It is vital that any new legislation comport with the many obligations the U.S. is under as a result of being a party to a number of treaties, the most basic and important of which is the General Agreement on Tariffs and Trade ("GATT"), discussed below.<sup>97</sup> Fundamentally, the U.S. cannot create laws that effectively attempt to supersede or alter its responsibilities and commitments under its treaty agreements; the U.S. must honor its agreements in the international marketplace and refrain from instituting non-tariff barriers to trade." The economic approach to trade agreements begins with the assumption that governments are motivated to pursue policies that increase national income, although they sometimes are forced to depart from that objective for political reasons."<sup>98</sup> If the U.S. breached any one of its treaties, naturally it would be in violation of that treaty and would subsequently face retaliation, international sanctions, and international scorn, at the very least.

*1. The GATT: A Brief History*

As the primary international and multilateral trade treaty to which the U.S. is a party, the GATT is a central and essential component of U.S. international trade policy. As a prelude to understanding the significance of the role the GATT plays in the world's market, it is important to note the treaty's historical function. Today, "electronic data transmissions, instantaneous business communications, and sophisticated service industries" characterize the U.S. market, which has evolved dramatically in recent decades.<sup>99</sup> Before the GATT came into being, trade

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97. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. See discussion *infra* pp. 26-29.

98. DOUGLAS A. IRWIN, PETROS C. MAVROIDIS, & ALAN O. SYKES, *THE GENESIS OF THE GATT* 177 (American Law Institute) (2008).

99. See Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT'L L. 101, 101-02 (1992).

relations were generally handled on a bilateral basis, with agreements being made between single foreign countries.<sup>100</sup> These bilateral agreements certainly were of some importance to trade relations among other countries, even though they were negotiated on an individual basis; this "changed dramatically with the advent of the GATT."<sup>101</sup>

During the early 1930s, when the world's leading trading nations were deep in recession, they introduced a series of highly protectionist measures which only further damaged international trade.<sup>102</sup> In seeking to remedy poor international trade relations, the U.S. and the UK began to discuss plans for a post-war system of regulating world trade.<sup>103</sup> Ultimately, the GATT arose from a United States Department of State publication released in 1945 that included a "Proposal for Consideration by an International Conference on Trade and Employment," and "[t]his document formed the basis for the negotiation of a Charter for an International Trade Organization" ("ITO").<sup>104</sup> As negotiations continued, "there developed a separate agreement to lock in negotiated tariff reductions. This was the General Agreement on Tariffs and Trade."<sup>105</sup> Pressed for time, the contracting parties concluded the "provisional" GATT, with the understanding that the ITO Charter ("Charter"), "once completed and ratified, would provide the institutional framework for the administration of the GATT."<sup>106</sup> When efforts to adopt the Charter failed, the U.S. was

100. *See id.* at 102.

101. *Id.* (noting that a "multilateral framework in which to negotiate and apply trade rules has been an important contribution to the development of trade law throughout the world").

102. HAMMOND SUDDARDS SOLICITORS, *THE ANATOMY SERIES OF INT'L INSTITUTIONS, AN ANATOMY OF THE WORLD TRADE ORGANIZATION* 1 (Konstantinos Adamantopoulos ed., Kluwer Law Int'l Ltd. 1997) [hereinafter *ANATOMY OF THE WORLD TRADE ORGANIZATION*].

103. *Id.*

104. Brand, *GATT*, *supra* note 99, at 117-18.

105. *Id.* at 118.

106. *Id.* at 118-19. However:

Once completed, the Charter suffered from congressional ambivalence toward international cooperation generally. Further concerns were raised because the Charter (1) dealt not only with trade, but also with the encouragement of full employment and with competition law matters, (2) may have been too legalistic for the time, and (3) like the GATT, contained many exceptions to its trade rules.

left with the GATT, “an executive agreement that itself was never ratified as a treaty by the United States,” and was adopted originally on a “provisional” basis.<sup>107</sup> “It contained no detailed provisions for a body to administer what rules it did contain,” and “provided only vague provisions on the resolution of disputes.”<sup>108</sup>

Today, the GATT is at once the Agreement itself, with its rules for international trade, and also “the organization that has grown up to fill the void left by the absence of the ITO.”<sup>109</sup> As such, the GATT “provides a legal framework for the conduct of trade relations, a forum for trade negotiations and an organ for conciliation and settlement of disputes.”<sup>110</sup> In 1986, the original GATT agreement underwent a considerable change during the Uruguay Round, at which point the negotiators agreed to add to the original text all adopted decisions by the GATT Contracting Parties since 1947.<sup>111</sup> The new, or updated, agreement has been termed “GATT 1994,” and is in fact a “negative integration-type of contract”: members “bind their classic trade instruments and are essentially free to define unilaterally all other policies which might affect trade . . . provided that they respect the principle of

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*Id.* at 119.

107. *Id.* The GATT was not intended to be a fully independent legal body; rather, its function was to act as an interim measure to put into effect the commercial policy provisions of the ITO. However, although fifty-three countries finally signed the ITO Charter in March 1948, the decision of the U.S. Congress to vote against its ratification left GATT as the sole (“interim”) framework for regulating and liberalizing world trade. See AN ANATOMY OF THE WORLD TRADE ORGANIZATION *supra* note 102, at 2.

108. Brand, *GATT*, *supra* note 99, at 119. The GATT mandate was to oversee international trade in goods and to gradually liberalize that trade as means of progressive reductions in tariff barriers. The furthering of trade liberalization was to be achieved by negotiation “Rounds” held between various GATT contracting parties on a regular basis. In all, there have been eight GATT Rounds, including the Uruguay Round. See ANATOMY OF THE WORLD TRADE ORGANIZATION *supra* note 102, at 2.

109. Brand, *GATT*, *supra* note 99, at 120.

110. *Id.* “The role of the GATT as a forum for trade negotiation has been emphasized by the eight rounds of trade negotiations conducted under its auspices,” and at the same time, “membership in the group of contracting parties has grown from the original twenty-three countries to over one hundred, with nearly thirty additional countries applying the GATT on a de facto basis.” *Id.* at 120-21.

111. See PETROS C. MAVROIDIS, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 11 (2005).



non-discrimination.”<sup>112</sup> Members to the GATT are obligated “to respect non-discrimination any time they intervene in their market through regulatory means,” thus causing trade to be affected; for example, conferring an advantage on domestic manufacturers in competition with foreign manufacturers, would violate the cornerstone principle of non-discrimination under the GATT.<sup>113</sup>

For the purposes of this Comment, the most significant aspect of the Agreement is Article III and its non-discrimination principle.<sup>114</sup> This standard of non-discrimination requires equality of treatment between domestic products and foreign products with regard to internal taxes and other laws.<sup>115</sup>

112. *See id.* at 11, 21.

113. *Id.* at 22, 29; *see* Report of the Panel on Uruguayan Recourse to Article XXIII, P 15, L/1923 (Nov. 15, 1962), GATT B.I.S.D. (11th Supp.) at 95 (1962) (procedural example of discriminatory practice allegations and recourse between contracting parties under GATT).

114. It is important to note, however, that each of the first three Articles of the General Agreement contain the foundation upon which the rest of the document is built. Article I begins with the most-favored-nation principle. The general rule is set out in Paragraph I of Article I:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 1 and 2 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 97, para. 1, art. I.

A contracting party may not discriminate against trade with one contracting party in favor of another contracting party; all other contracting parties must be treated as favorably as any other State in the application of tariffs and basic commercial policy rules. Meanwhile, Article II contains both the framework of the fundamental negotiation process within the GATT system and the statement of the preferred system of addressing protectionism in order to work toward less restrictive trade. This principle is set forth in paragraph 1(a) of Article II. By setting up a system of tariff schedules based on concessions negotiated in successive “Rounds,” Article II expresses the preference of the GATT system for tariffs as the accepted means of restriction of trade and as the focus for reducing existing trade restrictions through the reduction of those tariffs. *See generally* GATT.

115. The pertinent language is set out in several paragraphs of Article III. Paragraph 2 illustrates the concept as follows: “

## 2. *An Example of a Violation of the GATT*

As a means to assess the consistency of legislation such as S. 1606 with the mandates of the GATT, it is helpful to consider a scenario in which a U.S. Act was challenged as violative of the GATT. In one case, Section 337 of the U.S. Tariff Act of 1930 was targeted as a violation of the non-discrimination principle set forth in Article III of GATT.<sup>116</sup> Under Section 337:

[U]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale, are unlawful if they tend to destroy or substantially injure an industry efficiently and economically operated in the United States, prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the United States.<sup>117</sup>

There, the GATT Panel found various aspects of Section 337 discriminatory and thus inconsistent with Article III.<sup>118</sup> The

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The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

See GATT, *supra* note 97, para. 2, art. III. See also Ronald A. Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930*, 24 J. WORLD TRADE 5, 8 (1990).

116. See GATT, Art. III; Tariff Act of 1930, Section 337, 46 Stat. 703-04 (1930) *amended by* 19 U.S.C. § 1337 (1958)); Brand, *Private Parties*, *supra* note 115, at 6, 8, 19.

117. See Brand, *Private Parties*, *supra* note 115, at 19.

118. See *id.* The Panel found six factors that rendered Section 337 inconsistent with Article III of the GATT, four of which went unjustified by other exceptions enumerated by the GATT. These four U.S. violations of GATT obligations included: the “availability to complainants of a choice of forum in which to challenge imported products, whereas no corresponding choice is available to challenge products of U.S. origin”; “the potential disadvantage to producers or importers of challenged products of foreign origin resulting from the tight and fixed time-limits in proceedings under Section 337, when no comparable time-limits apply to producers of challenged products of U.S. origin”; “the non-availability of opportunities in Section 337 proceedings to raise counterclaims, as is possible in federal district court

Panel thus demonstrated that Article III applies to procedural measures enacted by the U.S., “remov[ing] any doubt that the Article III prohibitions against discriminatory treatment apply equally to procedural, as well as to substantive, laws, regulations or requirements.”<sup>119</sup> This aspect of the Panel’s report was particularly noteworthy because, after the challenge to Section 337, procedural differences constitute violations of Article III.<sup>120</sup>

Therefore, the ultimate “issue is not whether you treat the foreign defendant the same as a domestic defendant once proceedings have begun; it is whether you offer the domestic plaintiff a procedural advantage available where foreign products are involved that is not available where domestic products are involved.”<sup>121</sup>

### 3. S. 1606 and GATT

At first glance, S. 1606 seems very similar to Section 337. Both create procedural differences between foreign and domestic litigants, confer different obligations on involved parties, and each seems to confer procedural advantages on domestics that are not in place for foreigners. Indeed, S. 1606 seems to create the precise sort of procedural difference that violates Article III as it might give rise to instances of procedural advantages that are not there for foreign manufacturers. Generally, when world trade regulations and civil procedure mechanisms overlap and procedural advantages are created, objections identical to those raised in the Section 337 dispute will certainly be raised. Here, at its simplest, S. 1606 requires a foreign defendant to register locally while U.S. manufacturers apparently need not follow the same procedure, and so procedural advantages for domestic plaintiffs exist that are not shared by foreign litigants.

This analysis, however, is far too simplistic. The apparent similarities between Section 337 and S. 1606 are not as obvious as

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proceedings”; and “the possibility that producers or importers of challenged products of foreign origin may have to defend their products both before the USITC and in federal district courts, whereas no corresponding exposure exists with respect to products of US origin”. Brand, *Private Parties*, *supra* note 115, at 20.

119. See *id.* at 21.

120. See Telephone Interview with Ronald A. Brand, Professor of Law, University of Pittsburgh School of Law (Nov. 12, 2009).

121. See Brand, *Private Parties*, *supra* note 115, at 24.

they may seem. In fact, S. 1606 is entirely different than Section 337. While Section 337 made it easier to target foreign manufacturers than domestic manufacturers, S. 1606 does not make it easier to serve or obtain personal jurisdiction over foreign manufacturers, but rather institutes procedure to sue foreign manufacturers where none existed in the past. S. 1606 would require the consent of foreign manufacturers to one particular jurisdiction for personal jurisdiction and service purposes and in truth, this procedure is hardly different from that imposed upon domestic manufacturers.<sup>122</sup> All American manufacturers are subject to the jurisdiction of the courts of at least one state in the U.S., and often jurisdiction can be obtained in multiple states. S. 1606, therefore, would comply with Article III of the GATT as it does not discriminate against foreign defendants, for these foreigners will not be subjected to burdens not already imposed on domestic defendants.

Therefore, S. 1606 is consistent with U.S. treaty obligations under the GATT. It does not aim to create procedural advantages as between domestic and foreign manufacturers, instead only seeks to “level the playing field” by instituting amendments to a system that would otherwise provide procedural escape routes to foreign manufacturers avoiding litigation in the U.S. Indeed, S. 1606 is not making it more difficult for foreign manufacturers to operate in the U.S. market, nor is it going as far as to suggest that foreign corporations can now be sued in any state. The system operates equally on domestic manufacturers and foreign manufacturers. If a company conducts business in a state, registration in that state is necessary—it is the equivalent of designation of an agent. This does not necessarily equate to consent, but rather provides a recipient for service of process. A U.S. manufacturer can be sued in multiple states—at the very least, in the state of its principal place of business, or in its state

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122. See S. 1606. Because the foreign manufacturer would be required to designate an agent in only one state, the Act would not even subject a foreign manufacturer to suit nationwide without minimum contacts analysis or litigation. Also of note, a foreign manufacturer “could designate an agent for service in a state with laws more favorable to manufacturers,” proving further that, if anything, the advantage still lies with foreign manufacturers once subjected to litigation in the U.S. See Teitz, *Leveling the Playing Field*, *supra* note 23.

of incorporation or domicile. With the passage of S.606, foreign manufacturers would hardly find themselves at a disadvantage as they are merely being subjected to the same system. In fact, they maintain an advantage because they need only designate an agent in one state and do not necessarily have a principal place of business. Of course the foreign manufacturer could conceivably be sued in another state if a minimum contacts argument can be made, but that matter would need to be analyzed and would very likely be litigated, and the aim of S. 1606 is to eliminate such front-loaded costs. In effect, the foreign defendant simply must choose its domicile by designating an agent in a U.S. state. In the end, this is no different than what a U.S. corporation must do, and in truth is still easier on foreign manufacturers.

#### *D. Enforcement*

S. 1606 does not address the difficulties associated with enforceability of any judgment that might be awarded. If the losing party foreign manufacturer lacks assets, or has insufficient assets in the U.S., it will be nearly impossible for plaintiffs to recover the full value of the award elsewhere. Consent to jurisdiction certainly does not amount to payment of any judgment awarded. Therefore, "unless the producer has assets in the U.S., an American court judgment against an uncooperative [foreign] defendant might as well be recycled as scrap paper, because the document is pretty much worthless."<sup>123</sup>

While the bill might be criticized for overlooking the issue of enforcement, the unfortunate truth is that enforcement simply is not a realistic goal for this type of legislation, or any domestic legislation. The bill purports only to surmount the procedural hurdles of personal jurisdiction and service, not to guarantee enforcement of subsequent judgments. In no way does this legislation hope to correct and account for every situation. Rather, it is a means of eliminating the costly litigation that inevitably arises at the outset of suits against foreign manufacturers. On the rare occasion that foreign companies have little or no assets on U.S. soil, problems will continue to plague U.S. plaintiffs as they will be unlikely to receive their award. This frustrating reality is

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123. See CHINA HEARSAY, *supra* note 94. See also TRANSNATIONAL LITIGATION, *supra* note 37, at 251-90.

most readily expressed in the difficulties of both identifying and holding accountable the manufacturers of component parts, especially when these are fungible items such as toys and drywall, often unlabeled, or perhaps bearing only the name of the country from which they originated. The manufacturers of these products will continue to elude the system under this bill; however, the foreign companies that purchase and use these component parts would have strong incentive to keep track of the manufacturers of the faulty parts. Assuming there is a contract between those parties, indemnification will be a matter to be settled between those defendants. Meanwhile, the U.S. plaintiff, with the help of this bill, would ideally recover damages from the manufacturer of the completed product, who will then seek out and demand indemnification from the truly responsible party.

Perhaps it must be conceded that the U.S., or any country for that matter, will never be able to regulate enforcement of judgments. Conventions facing this issue have tried and failed in their negotiations regarding the problem of enforcement. The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters never became effective, and the difficulties, or perhaps impossibilities, associated with creating multilateral recognition of enforcing judgments proved overwhelming and insuperable.<sup>124</sup> As such, it is most appropriate to view S. 1606 not as an attempt to resolve swiftly an age-old dilemma of enforcement, but as a means to ameliorate the lengthy and costly litigation of initial procedural barriers. Indeed, the issue of enforcement cannot be resolved by

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124. See Juenger, *A Hague Judgments Convention?*, *supra* note 3, at 117. See also The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 249. The 2001 draft text of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, an interim text, was drawn up at Part One of the Nineteenth Diplomatic Session, which was held from June 6, 2001 to June 22, 2001. Hague Conference, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, June 6-22, 2001 (prepared by the Permanent Bureau and the Co-reporters). Not only was that document of the "unilateral" variety, thus leaving signatories free to claim jurisdiction on their own idiosyncratic grounds (though an optional "Supplementary Protocol" would have eliminated exorbitant jurisdictional bases), but its implementation also required the cumbersome further step of executing bilateral agreements between those nations that wanted to avail themselves of its provisions.

domestic legislation and must instead be undertaken in the international arena.

## V. CONCLUSION

With the high volume of foreign-made products shipped into the U.S. from day to day, it seems only natural that the U.S. adopt legislation to better enable its consumers to seek redress if these products from abroad ultimately injure them. S. 1606, the Foreign Manufacturers Legal Accountability Act, is an ideal bill to effectuate simpler and more effective means of suing foreign manufacturers, and the bill also serves the underlying health and safety policies by encouraging foreign manufacturers to produce safe items for export. Indeed, this bill is good policy on these multiple fronts.<sup>125</sup> Rather than changing any substantive law, the bill focuses on procedural aspects alone to make litigation against foreign manufacturers less time-consuming and expensive. Meanwhile, the competitive advantage enjoyed by foreign manufacturers over U.S. manufacturers would be eliminated, replaced by a system that would induce foreign manufacturers to comply with the same American safety standards with which domestic manufacturers must comply. This in turn results in safer, less hazardous products in the U.S. marketplace, which is always an aim of public policy.

Though the bill has not generated any recent attention, interest in the bill's policies, and at least an awareness of the issues it underscores, may gain momentum. Immediately following Senator Whitehouse's proposal of S. 1606, the bill received attention from various media outlets in Washington and beyond, and the bill gradually earned the support of a number of senators.<sup>126</sup> In the wake of Senator Ted Kennedy's passing and

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125. In addition to the benefits of S. 1606 discussed above, an important corollary of the bill is that it demonstrates the reality that procedural mechanisms and procedural law can have a very significant impact on trade. An increasing interrelationship between trade policy and dispute resolution is emerging, as noted by scholars in the field. For example, the free trade agreement ratified by the United States with Australia actually addresses the enforcement of judgments in the context of trade restraints and competition. See United States-Australia Free Trade Agreement art. 14.7, U.S.-Austl., May 18, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta>.

126. Reporters and bloggers alike took to the issue, and the National

the subsequent enthusiasm about pursuing health care-related agendas, however, S. 1606 faded into the background. This unfortunate timing worked against the bill in its earliest months at Senate, but now the bill stands to attract much greater attention with the American Association for Justice's devotion to 2010 as the "Dawning of a New 'Decade of Corporate Accountability.'"<sup>127</sup> S. 1606 is listed among the focuses of the AAJ for the coming years as the Association plans to take aim at corporate accountability and fortification of basic legal protections in the U.S.

Ideally, S. 1606 will pass into law; if not, further efforts must be made to deal with the inadequacies of the legal system and the inequities between foreign and domestic manufacturers. Currently, the system simply is not fit to deal with the problem of successfully suing foreign manufacturers; case law, rules, and policy have developed for internal, domestic use, thus it is no wonder why current procedure fails to capture the nuanced challenges associated with suing foreign manufacturers. Implementing the procedure outlined in S. 1606 would reduce and perhaps eliminate the front-loaded costs associated with litigation of the preliminary matter of personal jurisdiction, an automatically-raised defense to nearly every suit by nearly every foreign manufacturer defendant. The bill would demand accountability from foreign manufacturers and in doing so would

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Public Radio's Marketplace reported on it as well. See Dan Grech, *Bill eases how U.S. sues foreign firms*, Aug. 13, 2009, available at <http://marketplace.publicradio.org/display/web/2009/08/13/am-florida-drywall>.

127. See Ray De Lorenzi, *AAJ:2010 Dawning of New "Decade of Corporate Accountability,"* AM. ASS'N. FOR JUST., (Jan. 11, 2010), <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/11430.htm>.

'With the last ten years marred by a culture of protecting negligent corporations, the worst financial crisis in a generation, and a constant assault on the rights of workers and consumers, the American people will increasingly demand stronger consumer protections and resist big business attempts to undermine the civil justice system,' said American Association for Justice (AAJ) President Anthony Tarricone at a press briefing today. 'Coming off an era in which corporations – from Enron to AIG – were allowed to trump the interests of everyday Americans, the civil justice system will be the centerpiece of a new "decade of corporate accountability" that will balance the playing field that today tilts too much in favor of powerful corporate interests.'

*Id.*



finally put domestic and foreign manufacturers on even footing in the marketplace. With manufacturers both domestic and foreign playing by the same rules and subject to the same legal ramifications, American consumers would see safer products circulated and an unprecedented ease of suit against foreign manufacturers who continue to produce defective products. The difference, however, would be that the foreign manufacturers of these defective products would no longer enjoy the escape routes of our currently defective system.